314 U.S. 678

No. 536

FILED
AUG 21 1941
CHARLES ELMORE CROPLEY
CLERK

In The Supreme Court Of The United States

APPEAL FROM THE SUPREME COURT OF OHIO

No. 28,593

AND

FROM THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

No. 17,644

314 U.S. #2
HAL-HAN

ROBERT W. HALLIDAY,
Petitioner,

vs.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY,
Appellee

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

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SUPREME COURT OF THE UNITED STATES

TERM, 1941

No. ——

ROBERT W. HALLIDAY,

Petitioner,

vs.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY,

Appellee.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO.

To the Honorable Harlan F. Stone, Chief Justice of the United States; to the other Justices of said Honorable Court, and to the Honorable Supreme Court of the United States:

Now comes Robert W. Halliday, resident of Cleveland, Ohio, Petitioner herein, and says:

(1) Heretofore and on or about the 16th day of August, 1937, an action was commenced in the Court of Common Pleas of Cuyahoga County, Ohio, by Robert W. Halliday of Cleveland, Ohio, Plaintiff, against S. H. Squire, Superintendent of Banks in charge of liquidation of The Union Trust Company as defendant. The Petition in said

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Action alleged a claim for damages of Seven Hundred Forty One Thousand, Six Hundred Fifty-two Dollars and Eighty-nine cents ($741,652.89) resulting from injury to rights of the Plaintiff not arising on contract.

The Petition of the Plaintiff, the amended answer of the Defendant, and the Reply thereto were the pleadings which the Common Pleas Court of Cuyahoga County, Ohio, had before it when this case was called for a so-called *Pre-trial* hearing. The Defendant moved for judgment on the pleadings, and this motion was granted by the Common Pleas Court. No evidence whatsoever was heard or submitted to the Court.

The Defendant contended that the pleadings showed on their face that the Plaintiff was not entitled to any relief; That he was not entitled to any trial, by jury or otherwise; That there was no issue to try.

Plaintiff contended that the allegations in his petition were sufficient in Law to state a cause of Action for Money, Seven Hundred Forty One Thousand, Six Hundred Fifty-two Dollars and Eighty-nine cents ($741,652.89), and that the answer of the Defendant and the Plaintiff's reply do not change the character of the Plaintiff's cause of action, but raises issues triable before a Jury.

Look at the Plaintiff's Petition.

Look at the amended answer of Defendant.

First Defense set up in the amended answer raises issues on which Plaintiff is entitled to a jury trial.

In the case of *Rhodes vs. McDowell 24 OL APP. 94*, the Court held: "A judgment upon the pleadings cannot be rendered when issue is joined upon a material proposition."

Second Defense raises an issue which could have been determined by the Court, but Plaintiff filed a reply containing the following allegations:

"****the Defendant, the Liquidator of the Union Trust Company acknowledged receipts of Plaintiff's proof of claim on or about June 14, 1937; that said defendant thereafter held such proof of claim in silence; that on or about the end of July, 1937, the Plaintiff became apprehensive that the inaction of the Liquidator might be intentionally prolonged beyond the time when the Plaintiff's claim would become barred by Section 11224 of the General Code of Ohio, and notified the Liquidator in writing (by Registered Mail) that unless the claim was allowed or rejected on or before August 5, 1937, that said Plaintiff would consider that the Liquidator had rejected the claim; that said Liquidator failed to make response to Plaintiff's message and maintained silence beyond said August 5, 1937; that promptly after said August 5, 1937 Plaintiff prepared his Petition in the pending case and filed the same—on or before August 16, 1937, (Common Pleas Court No. 466,490) after rejection and within the time required by Section 710-92A of the Gen. Code."

Whether such was a filing without awaiting rejection from the Superintendent of Banks or not was a question of determination by a Jury.

Third Defense set up in the Amended Answer does not raise an issue.

The allegations set forth in said Third Defense are insufficient in Law to invoke estoppel by judgment and do not constitute a defense:

(1) because the prior judgments pleaded therein were not between the same parties;

(2) because the prior cases did not involve the same subject matter. The former actions involved the title of Real Property.

In the pending case Plaintiff asked for damages resulting from a *Conspiracy to Cheat* and for *Fraud practiced by The Union Trust Company.* The Union Trust Company was not a party to any of the prior suits pleaded by the Defendant.

Coates vs. Chillicothe State Bank 23 O. S. 415. Judge Day says: "It is true there is much in the petition, and in the prayer thereof, that looks like an effort to open the decree sought to be impeached, for the purpose of a retrial of the case."

But the parties in the two cases are different, and only that part of the decree affecting the plaintiff is impugned.

Wittee vs. Lockwood 39 O. S. 141. Judge Okey stated the General Rule to be that a party when sued is bound to set up every defense legal or equitable or both, which he may have to an action, and effectively waives those not pleaded, but an exception to the rule exists where a possible defense constitutes a set-off or counterclaim, and may become the basis of a new suit and this is true in those cases where different parties are found in the second case.

Fourth Defense contains a material allegation, to wit: "that at the time Plaintiff filed his petition herein more than four years had elapsed since he had knowledge of the Fraud alleged in the Petition." *Plaintiff filed a reply denying this allegation.*

The conspiracy alleged in the case at bar was not discovered by the Plaintiff until after he became Administrator d.b.n. of the Estate of Janet M. Halliday, deceased, and after he obtained possession of the books and papers of the Estate. This was after August 16, 1933 and within four years from the time when he commenced this action.

The question as to when Plaintiff discovered the Fraud is a question for a Jury to decide.

Plaintiff asserted that denial of the right of trial by Jury constitutes a violation of the Constitution of the State of Ohio, Article I, Section 5, and Amendment XIV, Section 1 of the Constitution of the United States. In consequence the motion to dismiss the appeal should be overruled.

Thereafter, on or about the 18th day of November, 1939, said Common Pleas Court of Cuyahoga County, Ohio, rendered final judgment against said Plaintiff and subsequently said judgment was entered in said action, which judgment provided as follows:

> "This cause came on to be heard and was submitted to the court on the pleadings. Thereupon, the motion by defendant for judgment on the pleadings is granted. It is therefore considered that said defendant go hence without day and recover of said plaintiff his costs of this suit. Judgment is rendered against the plaintiff for the costs herein."

Thereupon your Petitioner, the Plaintiff in said action, duly excepted to said judgment, and duly appealed from said judgment to the Court of Appeals, Eighth Judicial District of Ohio. Said Appeal duly came on for argument before said Court of Appeals, and your Petitioner, through his counsel, duly argued that said judgment should be reversed, and that said Plaintiff should be granted a hearing on the merits; and your Petitioner, then in said Court of Appeals, insisted that he had a right under the Constitution of Ohio to a trial by jury and that denial thereof would constitute a violation of Amendment XIV, Section 1 of the Constitution of the United States, and that Plaintiff was entitled to have all questions concerning said right determined by said Court of Common Pleas at a hearing on its merits.

Thereafter, on or about March 10, 1941, an order was spread upon the Journal in the office of the Clerk of said Court of Appeals, which order affirmed said judgment of said Common Pleas Court in the following words:

> "This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error. It is therefore considered that said Appellee recover of said Appellant his costs herein. Ordered, that a special mandate be sent to said

Court of Common Pleas, to carry this judgment into execution."

Thereupon your Petitioner duly excepted to said judgment, and duly appealed from said judgment to the Supreme Court of Ohio, by duly filing an Appeal of Right, and duly requested said Supreme Court of Ohio to allow the Appeal of Right and filed briefs in support of said Appeal, and insisted that he had a right under the Constitution of the State of Ohio and Amendment XIV, Section 1 of the Constitution of the United States, to a jury trial and that Plaintiff was entitled to have all questions concerning said right determined by said Common Pleas Court of Cuyahoga County, Ohio, at a hearing on its merits, but that said Supreme Court of Ohio refused to allow said Appeal of Right, and thereafter, on or about May 22, 1941 affirmed said Judgment of said Court of Appeals, and caused to be spread upon the Journal of the Clerk of the Supreme Court of Ohio the following entry:

"This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County upon the motion of the Appellee to dismiss the appeal filed of right herein, and argued by counsel.

"On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause."

"It is further ordered and adjudged that the Appellee recover from Appellant his costs herein expended."

Said decisions of said Courts and Judges, and of each of them, denied to your Petitioner the right held by your Petitioner under the Constitution of the State of Ohio, Article 1, Section 5, and Amendment XIV, Section 1 of the Constitution of the United States.

Wherefore, your Petitioner prays that a Writ of Certiorari may be issued, and that he may be allowed to bring up for review before the Supreme Court of the United States, the judgment of said Supreme Court of Ohio, and

that your Petitioner may have such other and further relief in the premise as may be just.

JAMES BRAVO, WM. T. ARNOS, R. W. HALLIDAY,
Attorneys for Petitioner,
1245 Leader Building,
Cleveland, Ohio.

STATE OF OHIO,
CUYAHOGA COUNTY, } ss:

ROBERT W. HALLIDAY, being first duly sworn, says: I am the foregoing Petitioner, and that the foregoing Petition is true to my own knowledge.

SWORN to before me this .... day of August, 1941.

Notary Public.

(2)

FILED

SEP 13 1941

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 346

ROBERT W. HALLIDAY,
Petitioner,

vs.

S. R. SQUIRE,
Superintendent of Banks of the State of Ohio,
In Charge of the Liquidation of
THE UNION TRUST COMPANY,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

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THE GONG LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 536.

ROBERT W. HALLIDAY,
Petitioner,

vs.

S. H. SQUIRE,
Superintendent of Banks of the State of Ohio,
In Charge of the Liquidation of
THE UNION TRUST COMPANY,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

THE PETITION DOES NOT INCLUDE MATTERS REQUIRED BY RULE 38-2.

On page 6 of his petition, the petitioner asserts that certain decisions of courts and judges, to which he had already alluded, denied to him the right held by him under the Constitution of Ohio, Article I, Section 5 and under the Constitution of the United States, Amendment 14, Section 1. He does not state whether he was so deprived of a right by reason of a state law abridging his privileges or immunities, or the manner in which such privileges or immunities were abridged; nor whether he was so denied such right by reason of being deprived of liberty of property without due process of law, nor wherein he was not accorded such due process; nor whether he was denied such right by reason of not being accorded equal protection of the law, nor wherein he was not accorded such equal protection.

He has not included in his petition a statement of the questions presented, nor a statement particularly disclosing the basis upon which this Court has jurisdiction to review the judgment in question, whether by reason of a decision of a federal question of substance not heretofore determined by this Court, or a decision upon such question in a way not in accord with applicable decisions of this Court.

By reason of such omissions, the petition for certiorari should be denied, we respectfully submit, upon the authority of *National Licorice Co. vs. Nat. Lab. Rel. Bd.*, 60 S. C. R. 569.

THE FACTS.

On page 2 of his petition, the petitioner correctly states that the judgment complained of was rendered upon our motion for judgment on the pleadings; and that the pleadings consisted of his petition as plaintiff, our amended answer and his reply. Because the petitioner has not stated the questions presented and has not stated the contents of the pleadings with sufficient fullness to disclose that no state statute was involved therein which was claimed to be violative of the constitutional provisions mentioned, and because the pleadings are so lengthy, occupying thirty-three pages of the record, we are submitting this brief summary of the facts which they disclose.

According to the petition the plaintiff's mother owned certain real estate at the time of her death. He was her sole heir at law. His father and The Union Trust Company, a state bank of which this defendant is liquidator, conspired together to cheat him, and as a result of such conspiracy deprived him of possession and of the rents of such real estate. The unlawful means employed by the conspirators to accomplish their end are not set forth in the petition. According to the petition, too, judgments were rendered not confirming the plaintiff's claimed ownership of

such real estate but denying such ownership. Such judgments were rendered in certain corporation dissolution proceedings mentioned in the petition. The dissolution proceedings were instituted by the conspirators through the instrumentality of plaintiff's father. The corporations whose dissolution was sought in such proceedings are referred to by the plaintiff in his petition as "alleged" corporations and "fictitious" corporations.

Our amended answer contained four defenses. The first was general denial, and by necessary implication it was waived by and for the purpose of our motion for judgment on the pleadings. The fourth was the general statute of limitations, which, too, was not argued by us or considered by the court in passing upon the motion for judgment on the pleadings for the reason that an issue was made thereon by the plaintiff who denied having the knowledge with which we charged him in our allegations constituting such fourth defense. Only our second and third defenses were argued by us in support of our motion for judgment on the pleadings and considered by the court.

Such second defense was to the effect that the defendant Superintendent of Banks had not, prior to the institution of the suit by plaintiff, rejected the claim which had been presented to him by the plaintiff; that by reason thereof, plaintiff's suit had been prematurely instituted. In his reply plaintiff did not deny that he had not awaited the rejection of his claim; he merely asserted in avoidance that he had notified the Liquidator that unless the claim was allowed or rejected within a stated period he would regard the claim as having been rejected; that the claim was not allowed or rejected within such period and that he thereupon instituted his suit. It is thus to be observed that there was no issue as to such second defense by reason of a denial by the plaintiff; and by necessary implication by and for the purposes of our motion for judgment on the pleadings we admitted the truth of the matters in avoidance so alleged in the reply.

In our third defense we pleaded in detail the pleadings filed, proceedings had and judgments rendered in the cases to which plaintiff had alluded in his petition. And we pleaded in detail the pleadings filed, proceedings had and judgments rendered in another action which plaintiff himself had instituted for the purpose of establishing claimed ownership of such real estate, in which suit, too, plaintiff's claimed ownership of such real estate had been denied. In his reply to such third defense, plaintiff did not deny any allegation contained therein. In fact, as is shown on page 33 of the record in the next to the last paragraph of his reply, plaintiff adopted the allegations of such third defense, as he said "to supplement the allegations of his petition." Plaintiff also included in his reply to such third defense allegations to the effect that the judgments against him in the dissolution proceedings, whereby his claimed ownership of such real estate had been denied, had been induced by the production in the evidence of certain false certificates of corporate resolutions, which false certificates he himself had made; but that he had made the false certificates by reason of duress which had been practiced upon him by an officer of The Union Trust Company in pursuance of the conspiracy to cheat him; that such duress consisted of threats by such officer to foreclose mortgages upon such real estate.

It is thus apparent that just as there was no issue upon our second defense occasioned by any denial of plaintiff, so there was no issue upon our third defense occasioned by any denial of the plaintiff; and by necessary implication, by and for the purposes of our motion for judgment on the pleadings, we admitted the truth of the new matter pleaded by the plaintiff in reply to our third defense, just as we made such admission of plaintiff's new matter pleaded in reply to our second defense.

Thus the pleadings show that there was no disagreement of fact insofar as the plaintiff's claim and our second

defense and his reply thereto was concerned; and no disagreement of fact insofar as plaintiff's claim and our third defense and his reply thereto was concerned. And they show that neither the plaintiff's claim against the Liquidator of The Union Trust Company nor any defense of the Liquidator thereto was based upon any federal statute or any state law at any time claimed to be in violation of any federal constitutional provision.

There is just one more fact to which we wish to allude in this recital. It is that just as the record shows at page 35 that on November 18, 1939 our motion for judgment on the pleadings was granted, as the petitioner herein alleges that it was, so on the same page of the record it appears that on September 27, 1939 the plaintiff filed a brief opposing such motion for judgment on the pleadings. We mention this as illustrative of the fact that the judgment which the petitioner claims violates his constitutional rights was rendered only after he had been given an opportunity and had availed himself of an opportunity to oppose such judgment.

THE QUESTION PRESENTED.

From such facts, and from the statements and arguments of the petitioner on pages 2, 3 and 4 of the petition to the effect, or designed to be to the effect, that the allegations of our second defense and his reply thereto made an issue determinable by a jury, and that our third defense does not constitute a defense, and from his recital of his repeated demands for and insistence upon a jury trial, we assume that the following is the question which he intends to present:

> Does Amendment 14, Section 1 of the Constitution of the United States authorize or require this Court to review a judgment of a state court rendered on the pleadings, when the losing party claims that such judgment was erroneous and that by reason thereof he was denied a jury trial which he had persistently demanded?

ARGUMENT.

This Court has held that when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision does not deprive the unsuccessful party of his property without due process of law within the meaning of the Fourteenth Amendment. *Bonner vs. Gorman, Admr.*, 213 U. S. 86. To the same general effect see *In Re: Converse, Petitioner*, 137 U. S. 624, *Central Land Company vs. Laibley*, 159 U. S. 103 and *Howard vs. Kentucky*, 200 U. S. 164.

And this Court has held that trial by jury is not one of the rights secured by the Fourteenth Amendment. *Hawkins vs. Bleakly, Auditor of the State of Iowa, et al.*, 243 U. S. 210.

And this Court has decided the identical question here presented in *Iowa Central Railway Company vs. Iowa*, 160 U. S. 389, from which we quote paragraphs 3 and 4 of the syllabus as follows:

> "This court has no power to review a decision of a state court that the averments of an answer in a pending case set forth no defense to the plaintiff's claim.
>
> "It is no denial of a right protected by the Constitution of the United States to refuse a jury trial in a civil cause pending in a state court, even though it be clearly erroneous to construe the laws of the State as justifying the refusal."

If an erroneous judgment on the pleadings were reviewable because the losing party was thereby deprived of a trial by jury, an erroneous judgment on a demurrer should likewise be reviewable. And an erroneous judgment on a directed verdict should likewise be reviewable. And an erroneous judgment *non obstante* should likewise be reviewable. And since the gravamen in each such example is the denial of justice by reason of error, then every erroneous judgment should be reviewable by this Court. And since invariably the losing party thinks that the judg-

ment against him is erroneous, every judgment should be reviewable by this Court. And the absurdity of the last such conclusion but emphasizes the error of the first.

The Fourteenth Amendment guarantees that every litigant shall have his day in court. It does not guarantee that justice shall be infallibly administered.

Rhodes vs. McDowell, 24 O. App. 94, *Coates vs. Chillicothe State Bank*, 23 O. S. 415, and *Wittee vs. Lockwood*, 39 O. S. 141, cited by the petitioner in his brief, have no application to the case at bar. But if they unquestionably demonstrated that the judgment which the petitioner seeks to have reviewed was erroneous, the prayer of the petition should nevertheless, upon the authority of the decisions of this Court which we have cited, be denied.

CONCLUSION.

We submit that the petition should be denied for failure to comply with the requirements of Rule 38-2; and that the petition should be denied because there is not presented a federal question of substance not heretofore determined by this Court, nor a federal question of substance decided in a way not in accord with applicable decisions of this Court.

Respectfully submitted,

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FILED
OCT 15 1941
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In the Supreme Court of the United States

October Term, 1941

No. 536

ROBERT W. HALLIDAY,
Petitioner,

vs.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT

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In the Supreme Court of the United States

October Term, 1941

No. 536

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S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT

Petition For Writ Includes All Matters Required By Rule 38 - 2.

On Pages 4, 5 and 6 of the Petition for Writ, the Petitioner has set forth the details of the proceedings in each of the State Courts and the manner in which he was denied the benefits of a trial by jury in violation of Article 1, Section 5 of the Ohio State Constitution, and in violation of Amendment XIV, Section 1 of the Constitution of the United States.

ARGUMENT

– A –

RIGHT OF TRIAL BY JURY ON ISSUES RAISED BY FIRST DEFENSE OF AMENDED ANSWER

The First Defense set up in the Amended Answer filed in the Common Pleas Court raised issues on which Plaintiff was entitled to a jury trial. (RECORD 11 to 12).

In the case of *Rhodes vs. McDowell,* 24 O. App. 94, it was held:

> "A judgment on the pleadings cannot be rendered when issue is joined on a material proposition."

Respondent cites the case of *Hawkins vs Bleakly, Auditor of the State of Iowa, et al.*, 243 U.S. 210, and the case of *Iowa Central Railway Company vs. Iowa*, 160 U.S. 389, to support its contention that trial by jury is not one of the rights secured by the Fourteenth Amendment. These decisions have no force and effect upon the proceedings in the pending case, for the reason that the State of Iowa was free to pass laws wherein its inhabitants might be *Denied A Trial By Jury*, whereas, in the State of Ohio, each inhabitant thereof is guaranteed the benefit of *A Jury Trial By An Act Of The United States Congress.*

In the case of *Missouri vs. Lewis*, 101 U. S. 22-31, Mr. Justice Bradley held:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right."

I U. S. Stat. 51 provides:

> "It is hereby ordered and decreed by the United States Congress assembled that the following Articles shall be considered as a Compact between the Original States *and* the People and States in the said Territory, and forever remain unalterable, unless by common consent, to-wit:--"

Art. I relates to religious liberty. Article II entitles each inhabitant of the Northwest Territory to the benefits of trial by jury. These rights have not been abandoned in Ohio.

ARTICLE I, SECTION 5 OF THE OHIO STATE CONSTITUTION ADOPTS ART. II OF THE

ORDINANCE OF 1787 AND SAID ACT OF THE UNITED STATES CONGRESS I U. S. STAT. 51.

Article I, Section 5 of the Ohio State Constitution is as follows:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Section 11378, General Code of Ohio provides:

"An issue of fact arises upon a material allegation in the petition denied by answer."

Section 11379, General Code provides:

"Issues of fact arising in actions for money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived."

Section 11421-1 General Code provides:

"In actions arising on contract, the trial by jury may be waived by the parties, and in other actions with the assent of the Court, as follows:

(1) By consent of the party appearing, when the other party fails to appear at the trial in person, or by attorney.

(2) By written consent, in person, or by attorney, filed with the clerk.

(3) By oral consent in open court, entered on the journal."

It is not claimed that a jury trial was waived. The record does not show such waiver, and Petitioner says for the information of the Supreme Court that a Jury Trial was not waived.

In the pending action, issues of fact arose for money only, upon material allegations in the petition denied by the Amended Answer.

In the case of *Rhodes vs. McDowell,* 24 O. L. App. 94, the Ohio Court held:

> "A judgment upon the pleadings cannot be rendered when issue is joined upon a material proposition."

The general denial of Defendant-Respondent was not waived by implication, as asserted by Respondent in the Answer Brief on Page 3.

– B –

THE RIGHT OF TRIAL BY JURY CANNOT BE INVADED BY LEGISLATIVE ACT OR BY JUDICIAL DECREE

In the case of *Gibbs vs. Girard,* 88 O. S. 34, in the 2nd paragraph of the syllabus, the Court held:

> "The right of trial by jury being guaranteed to all our citizens by the Constitution of the State, cannot be invaded or violated by either legislative act or judicial order or decree."

In the case of *Central Land Company vs. Saibley,* 159 U. S. 103, cited by Respondents, the Court says:

> "In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its Judicial department only."

also

> "The Appellate Jurisdiction of the United States

Court, upon a Writ of Error to a State Court, on the ground that the obligation of a contract has been impaired, can be invoked only when an Act of the Legislature alleged to be repugnant to the Constitution of the United States has been decided by the State Court to be valid, and not when an Act admitted to be valid has been misconstrued by the Court."

This decision is sound, but it applies to facts relating to the impairment of a contract, where the petitioner contended before the Supreme Court of the United States for a review of the decision of a State Court, which was charged with the act of impairment.

This Central Land Company case reached the U. S. Supreme Court through the contention of infringement of the provisions of Article X of the Constitution of the United States. The language of Article X is in essential part as follows:

"No state shall *Pass Any Law* impairing the obligation of contracts."

The language of Amendment XIV, Section I, is different, and as follows:

"No state shall *Make Or Enforce Any Law* which shall abridge the privileges or immunities of Citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

"NO STATE SHALL MAKE OR *ENFORCE* ANY LAW, ETC."

"NOR DEPRIVE ANY PERSON OF....., PROPERTY, WITHOUT *DUE PROCESS OF LAW*."

are words of limitation upon State Legislators and *State Judges.*

– C –

THE SUPREME COURT OF THE UNITED STATES MAY REVIEW THE EXERCISE OF THE JUDICIAL FUNCTION OF A STATE COURT

The case of *Howard vs. Kentucky,* 200 U. S. 164, cited by Respondent, supports the contention of the Petitioner respecting the existence of a Federal Question of substance, because the Supreme Court did review the action of the Supreme Court of Kentucky, and held:

> "That the accused, the petitioner, was not denied due process of law within the meaning of the XIV Amendment by the State Court in discharging a juror in a murder trial before he was sworn, after questioning him in the absence of the accused, but with the consent of counsel, and substituting another juror equally competent."

In all other respects the Howard case is not a parallel case and is not applicable to the proceedings in the pending case.

In the case of Converse, reported in 137 U. S. 624, and cited by Respondent, the Court held:

> "The XIV Amendment was not designed to interfere with the exercise of the power of State Courts to administer the process provided by its laws."

But the Converse case did not originate within the State of Ohio, nor within the area formerly known as the Northwest Territory, in which the Act of Congress, I. U. S. Stat. 51, has pre-determined and established due process for Courts of the State of Ohio.

None of the cases cited by the Respondent originated in the area of the Northwest Territory.

This Petitioner cites the case of *Tari vs. the State of Ohio,* 117 O. S. 481, wherein the Court, on page 485, says:

> "It is of course essential to the validity of any

judgment that the Court rendering it should have jurisdiction, not only of the parties, but of the subject matter. But it is equally well settled that it is for the Supreme Court of a State finally to determine its own jurisdiction, and that of other local tribunals, since the decision involves a construction of the laws of the State by which the Court was organized. The federal question is whether in the State Court, acting within such jurisdiction, the defendants were denied due process of law. It is within the province of the United States Supreme Court to determine whether a jurisdiction *So Exercised* operates as a denial of due process of law."

Chief Justice Marshall of Ohio quoted the foregoing from the decision of Justice Lamar in the case of *Standard Oil Co. vs. Missouri,* 270 U. S. Rep., at pages 280 and 281.

In the Tari case, 117 O. S., at page 486, Chief Justice Marshall says—

"While a State can fix, determine and define the jurisdiction of its courts, it is still open to the United States Supreme Court to determine whether a jurisdiction *so exercised* operates as a denial of due process of law."

In the case of *Tumey vs. Ohio,* 273 U. S. Rep. 510-511, the Court held:

"Judgment of a court within its jurisdiction is final and conclusive, unless so clearly unsupported as to indicate mistake, bias or willful disregard of duty."

In the Tumey case, the Court also held that the interest of the mayor in the result of his decision resulted in a voidable judgment, and on page 531, Chief Justice Taft says:

"From this review of the common law we conclude that a system by which an inferior judge is paid for his services only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law."

Chief Justice Taft declared the judgment to be violative of Amendment XIV.

From these cases it appears that power to review the exercise of the judicial function of a state court to determine whether the function, as operated, resulted in a denial of due process of law, is within the province of the Supreme Court of the United States if the action of the State Court is so clearly unsupported as to indicate mistake, bias or willful disregard of duty. The pending case falls in this category.

In the pending case the nisi prius Judge was handicapped by a mortal disease, which enfeebled his body and weakened his will. Discernment was lacking. Application of law yielded to recognition of prestige of opponents of the Plaintiff.

The Judge was grossly mistaken about the law and the facts of the pending case relating to the question of prior adjudication raised by the Defendant, in the third defense of the Amended Answer. (R—14 to 30).

Four certain cases involving the title to Real Property in the dissolution of corporations in which the Plaintiff herein appeared as a party therein, were pleaded in the pending case by Respondent and alleged to constitute a prior adjudication of money matters involved herein.

Three of said alleged prior cases are titled as follows:

Peter Halliday vs. The York-Lake Co., No. 330247 C. P.

Peter Halliday vs. The Richmond Improvement Co., No. 330248 C. P.

Peter Halliday vs. The Inland Properties Co., No. 380249 C. P.

The Union Trust Company filed a motion in the Court of Appeals, for leave to become a party in each of said cases, but the motion was denied by the Court of Appeals.

The fourth one of these cases as pleaded by Defendant-Respondent, to-wit:—Common Pleas Court Case No. 361753, is found on pages 24, 25, 26 and 27 of the Record.

The title of said case and all the parties are as follows:

No. 361753 C. P.

Cancellation, Rescission, To Quiet Title and Relief.

Robert W. Halliday,

vs.

Peter Halliday,
Peter Halliday, Admr.,
Francis J. Horvath, Receiver of The York-Lake Co.,
Francis J. Horvath, Receiver of The Richmond Improvement Co.,
Francis J. Horvath, Receiver of The Inland Properties Co.,
The York-Lake Co.,
The Richmond Improvement Co.,
The Inland Properties Co.

Neither the Defendant-Respondent, nor the predecessor of Respondent was a party in said alleged prior suits. In each of the alleged prior suits, issues were joined on the question of Title to Real Property. The subject matter of the pending suit is a claim for money arising in Tort and not upon a contract.

The ailing Judge failed to observe the vital facts and neglected to apply the well-established general rule of law

so clearly announced in the case of *Coates vs. Chillicothe State Bank*, 23 O. S. 415, where on page 433 Judge Day says: "It is true there is much in the petition, and in the prayer thereof, that looks like an effort to open the decree sought to be impeached, for the purpose of a retrial of the case. But the parties in the two cases are different, and only that part of the decree affecting the plaintiff is impugned. * * It follows that the District Court erred in sustaining the motion to dismiss the appeal, the judgment of that court must therefore be reversed, and the cause remanded for further proceedings."

In the case of *Witte vs. Lockwood*, 39 O. S. 141, Judge Okey stated the General Rule to be that a party when sued is bound to set up every defense legal or equitable or both, which he may have to an action, and effectively waives those not pleaded, but an exception to the rule exists where a possible defense constitutes a set-off or counterclaim, and may become the basis of a new suit and this is true in those cases where different parties are found in the second case.

Petitioner was deprived of the benefits of a trial by jury guaranteed to him by Article I, Section 5 of the *Ohio* Constitution, and by Amendment *XIV*, Section I, of the United States Constitution, upon the basis of prestige, and not by the careful consideration of a Court, able to hear and determine.

– D –

ADMISSIONS BY RESPONDENT IN THE OHIO STATE COURTS AND IN ITS BRIEF FILED IN THE SUPREME COURT OF THE UNITED STATES

The Ohio Courts were made aware of the facts involved in the Second Defense of the Amended Answer by the allegations of Plaintiff's Reply (See Petition for Writ, page 3).

In the lower courts the Respondent admitted the truth of said allegations to-wit: That said Defendant, the Liquidator of the Union Trust Co. acknowledged receipt of Plaintiff's Proof of Claim against the defunct Union Trust Co. on or about June 14, 1937 and that said Liquidator held said Proof of Claim in silence with the intention of postponing action on said claim beyond the time when said claim would become barred by Section 11224 of the General Code of Ohio and that the Plaintiff became aware of such motives and anticipated such delay and thereupon about the end of July 1937 notified the Liquidator in writing (by Registered Mail) that unless the Claim was allowed or rejected on or before August 5, 1937, that said Planitiff would consider that the Liquidator had rejected the claim.

Respondent admits that the said Proof of Claim for Seven Hundred, Forty-one Thousand, Six Hundred Fifty-two Dollars and Eighty-nine Cents ($741,652.89) was therefore held in silence by said Liquidator beyond said 5th day of August 1937, and that promptly thereatfer on or before August 16, 1937, the Plaintiff prepared an filed his Petition in Case No. 466,490 in the Common Please Court of Cuyahoga County, Ohio.

On Page 3 of Respondent's Brief opposing Petition for Writ, Respondent admits the truth of matters in avoidance so alleged in the Reply (of the Plaintiff).

Such admission covers the following allegation of said Reply; . . . "that Plaintiff prepared and filed his Petition on or before August 16, 1937 after rejection and within the time required by Section 710-92a of the General Code of Ohio."

The last foregoing allegation is incorporated in said Record (R-31).

THE FOLLOWING CASES CITED BY RESPONDENT TO SUPPORT ITS CONTENTION THAT THE PETITION FOR WRIT IS INSUFFICIENT, ACTUALLY SUPPORT THE CONTENTION OF THE PETITIONER.

In the case of *National Licorice Co. vs. Nat. Lab. Rel. Bd.*, 60 S. C. R. 569, 309 U. S. 350, the petition for writ was held to be sufficient, and the Supreme Court reviewed the decision of the Lower Court and modified the judgment of the Lower Court.

In the case of *Bonner vs. Gorman, Admr.*, 213 U. S. 86, the United States Supreme Court refused the Writ on the ground that the Petitioner injected the Federal question only after the Second Appeal. In the pending case, the Petitioner injected the Federal question in the Court of first instance.

– E –

REPLY TO IMPERTINENT MATTERS

Respondent has injected impertinent matters in its Brief. On Page 4 of its Answer Brief, Respondent has related that Petitioner made false certificates of corporation resolutions under duress of an officer of The Union Trust Company. Such statement is untrue and impertinent. An officer of The Union Trust Company urged the execution thereof for evidence of authority to deposit and withdraw money in and from the Bank, and in hostile manner directed the Petitioner to place his signature upon Printed Certificates of Corporate Resolutions furnished by The Union Trust Company, and designated as Form M-96 5M 1-27 and titled—

"CERTIFIED RESOLUTION
FOR
THE UNION TRUST COMPANY
CLEVELAND, OHIO."

– F –

CONCLUSION

Petitioner contends that he is entitled to *A Day in Court Before A Jury,* under the provision of Article I, Section 5 of the Ohio State Constitution; under I U. S. Statute 51, and under Amendment XIV, Section I of the United States Constitution.

Petitioner contends that he has complied with the requirements of law and the rules of Court and that the Petition filed herein presents a Federal question of substance not heretofore determined by this Court.

Respectfully submitted,

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